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Supreme Court, U.S.
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No. 02-1856

In the Supreme Court of the United States

APPLIED COMPANIES, INC.,
Petitioner,
v.
DONALD H. RUMSFELD, SECRETARY OF DEFENSE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITIONER'S REPLY BRIEF

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PARTIES TO THE PROCEEDING
(and Corporate Disclosure Statement)

Petitioner

Applied Companies is a California corporation, which has not issued shares to the public. No publicly held corporation owns any of Applied Companies' stock.

Respondent

Respondent is the United States of America acting by and through the Department of Defense, Donald H. Rumsfeld, Secretary.

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32 Public Contract Law Journal 677 (Summer 2003)
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THE GOVERNMENT ASSERTS THAT THE DECISION BELOW ENUNCIATES A "CARDINAL PRINCIPLE" UNKNOWN IN ESTABLISHED CONTRACT LAW

The Government's Brief for Respondent (BR) asserts that the Federal Circuit "observed" "a cardinal principle of contract law is that the non-breaching party is not entitled to be placed in a better position than it would have occupied had the breach not occurred." BR p.9. The Government is probably correct in anticipating that the Federal Circuit's majority opinion, if not reversed, can be cited for such a "principle." See Appendix p.25a. The effect of that "principle" in this case is that the contractor is denied recovery of any of the profit that it would have made if the Government's estimate had been a true, reasonable approximation of its needs. The "principle" precludes that recovery because, as the Government explains, "if DLA had properly estimated its requirements – i.e. if no breach had occurred – petitioner would not have expected to sell 120,000 cylinders." BR p.9.

As noted by the dissent, that "principle" treats the Government's misrepresentation "as if it had never happened." Appendix p.37a. Under the "principle" no contractor with the Government will be able to recover the expectation generated by a misrepresentation in the contract because that expectation would not have arisen without the breach.

In established contract law, there is no "cardinal principle" that speculates what would have happened "had the breach not occurred" and had the contract not contained a misrepresentation. Under established law, the principal measure of damages is the injured party's "expectation interest as measured by the loss in value to him of the other

party's performance caused by its failure or deficiency." Restatement of Contracts 2d § 347. When the breach is a misrepresentation, that remedy is "to place the plaintiff in as good a position as he would have been in had the representation been true." Williston on Contracts (3d Ed.) § 1514 and see UCC § 2-714(2). Miller v. Robertson, 266 U.S. 243 (1924), cited by the Government, does not support the new "principle" that the representation is to be ignored in measuring damages, but simply confirms the established measure by noting that the injured party is entitled to that measure, not more, and is "not entitled to be put in a better position by the recovery than if the buyer had fully performed the contract." 266 U.S. at 260. As is shown by the result in this case, a remedy that puts the injured party in as good a position as he would have occupied had the other party fully performed, or had his representations been true, is quite different from a remedy that speculates what would have happened if a misrepresentation had not been made. The Federal Circuit's new "principle," which looks back to see what expectations would have been had a misrepresentation not been made, does not exist in established contract law. It cannot exist because every contract that contains a misrepresentation would have been different or not have been formed at all if the misrepresentation had not been made.

The fundamental issue of this case is whether the Federal Circuit is to apply to government contracts the established law of contracts between private parties, or is free to establish new rules that depart from that law. The principle that the government is subject to established contract law is established by decisions of this Court. E.g. Lynch v. United States, 292 U.S. 571, 599 (1934), United States v. Winstar Corp., 518 U.S. 839, 895 (1996), and Mobil Oil Exploration and Producing, Southeast, Inc. v. United States, 530 U.S. 604, 607 (2000). Petitioner is not alone in asserting that the

Federal Circuit departs from that established contract law and from those decisions of this Court. That is argued in the pending Petition for a Writ of Certiorari in United Technologies Corp. v. Rumsfeld, No. 03-128, dated July 21, 2003 ("The ruling of the Federal Circuit in this case thus disregards this Court's clear instruction in Mobil Oil Exploration, Winstar, and many other cases that the Government is held to the same standard as a private party in performance of its contracts." P.18.). The Federal Circuit's departures from established contract law are also noted in Johnson, *Mixed Nuts and Other Humdrum Disputes: Holding the Government Accountable Under the Law of Contracts Between Private Individuals*, 32 Public Contract Law Journal 677 (Summer 2003). Whether those departures may continue is the issue here.

Respectfully submitted,

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